Supreme Court, U.S.
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No. 00-763

In The

Supreme Court of the United States

SHARON B. POLLARD,

Petitioner,

v.

E.I. DU PONT DE NEMOURS AND COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent E.I. du Pont de Nemours and Company ("DuPont") has no parent company. There are presently 13 publicly held entities in which DuPont, or a subsidiary or affiliated company of DuPont, owns an interest: DuPont Canada Inc. is a consolidated subsidiary, and the following companies are companies in which DuPont holds a minority, non-controlling interest:

Bionova Holding Corporation
Celgene Corporation
DuPont Photomasks, Inc.
Healtheon/WebMD Corporation
Hologic, Inc.
Hudson Technologies, Inc.
ImproveNet, Inc.
Kos Pharmaceuticals, Inc.
Maxygen Inc.
Shaman Pharmaceuticals Inc.
Syncor International Corporation
Trigon Healthcare, Inc.

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STATEMENT OF THE CASE

This Title VII action, alleging discrimination based on gender, was originally filed by Sharon B. Pollard ("Petitioner" or "Pollard") against E.I. du Pont de Nemours and Company ("Respondent" or "DuPont") in the United States District Court for the Western District of Tennessee in 1995. Pollard also alleged intentional infliction of emotional distress and negligence. After a trial to the court without jury, the district court awarded Petitioner $107,364 in back pay and accrued benefits, $300,000 in compensatory damages, attorney fees and costs on the discrimination claim. *Pollard v. E.I. du Pont de Nemours and Co.*, 16 F.Supp. 2d 913, 924 (W.D.Tenn. 1998).[1] The only part of the district court's opinion relevant to the issue presented here is a short statement in a footnote to the effect that the court was bound by the position of the Sixth Circuit that front pay is subject to the damage limitations contained in 42 U.S.C. § 1981a. *Pollard*, 16 F.Supp. at 923 n.19.

A timely appeal was taken by DuPont to the United States Court of Appeals for the Sixth Circuit. Pollard filed a cross-appeal on the limitation of front pay damages and as to the summary judgment that dismissed her state law claim. The Sixth Circuit reversed the judgment as to the district court's summary judgment in favor of DuPont and remanded for trial of the state law claim of the intentional infliction of emotional distress. In all other

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[1] Inexplicably, Petitioner failed to include the entire opinion of the district court in the appendix to her Petition. Therefore, when necessary, we will cite to the official report of the decision.

respects, the Sixth Circuit affirmed the judgment of the district court. (26a). The panel decision properly concluded that it was bound by that court's prior decision relative to the cap on front pay. (22a).

Petitions for rehearing and rehearing *en banc* of both parties were denied on August 25, 2000. (App. 49a). The Sixth Circuit's mandate to the district court issued on September 6, 2000. The state law claim is now in discovery and is scheduled to be tried in February, 2001. The instant Petition for Writ of Certiorari was filed with this Court on November 13, 2000.

REASONS WHY PETITION SHOULD BE DENIED

I.

THERE IS NO WIDESPREAD AND SIGNIFICANT CONFLICT AMONG THE CIRCUITS

Petitioner's principle argument is that there is a split of authority among the circuits as to whether front pay is subject to the cap of 42 U.S.C. § 1981a. However, a close examination of those cases reveals less than a square conflict of significant proportions to warrant this Court's intervention and plenary review at this time.

First, it is worthy to note that the instant decision does not expand any difference of approach to the question presented by the courts of appeals as Petitioner correctly notes (Pet. 4). The Sixth Circuit has been consistent in its position.

On the issue presented, the panel in the instant case was bound by the Sixth Circuit's prior decision in *Hudson*

v. Reno, 130 F.3d 1193 (6th Cir. 1997), *cert. denied*, 119 S.Ct. 64 (1998) (22a). In *Hudson*, the Sixth Circuit held that the statutory limit on damages applied to front pay. The subsequent denial of *en banc* review in the instant case (49a-50a) did not change the position of that court. The instant decision, therefore, does not affect the balance of opinions among the circuits that would warrant resolution by this Court.

Petitioner's sweeping assertion of a conflict of opinions (Pet. 5) does not withstand studied analysis. A deep, abiding division among the circuits is not as yet clear. For example, of the cases cited by Petitioner (Pet. 5), it can be fairly said that the D.C. Circuit's analysis of the issue is dicta. *Martini v. Federal Nat'l Mortgage Ass'n*, 178 F.3d 1336, 1348-49 (D.C. Cir. 1999), *cert. dismissed*, 120 S.Ct. 1155 (2000).[2] Only the Ninth Circuit deals at any length with the legislative history, and then without any real analysis of the plain language of the statute. *Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1154 (9th Cir. 1999).

The remaining authorities, from the Eighth and Tenth Circuits, rely primarily on the comparison of front pay to equitable relief without any meaningful analysis of legislative history. *See Kramer v. Logan County School District No. R-1*, 157 F.3d 620, 625-26 (8th Cir.), *reh'g and reh'g en banc denied*, 1998 U.S. App. LEXIS 34126 (8th Cir. 1998);

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[2] Although not cited by Petitioner, the Seventh Circuit recently also addressed in dicta the issue presented but decided the case on much narrower grounds. *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 499, 501 (7th Cir. 2000).

Medlock v. Ortho Biotech, Inc., 164 F.3d 545 (10th Cir.), *cert. denied*, 120 S.Ct. 48 (1999).

Medlock is especially a problem for Petitioner's theory of conflict because, although the Tenth Circuit maintains that front pay is a form of equitable relief, a jury decided the question of front pay. *Medlock*, 164 F.3d at 555 n.8. It is settled that a jury should not be used to determine equitable relief. *See, e.g., Williams v. Pharmacia, Inc.*, 137 F.3d 944, 951 (7th Cir. 1998); *Wilson v. Belmont Homes, Inc.*, 970 F.2d 53, 55-56 (5th Cir. 1992). Therefore, it is highly questionable whether the Tenth Circuit's position is squarely in conflict with that of the Sixth Circuit.

It is also worthy of note that, except for the Eighth Circuit in *Kramer*, none of the circuit authorities cited by Petitioner have been through the helpful assay of a request for *en banc* review.[3]

II.

THE LOWER COURTS CONTINUE THE DELIBERATION AND ANALYSIS OF THE ISSUE PRESENTED

Although the question of caps on certain types of damages was introduced in 1991, it has been only in the last few years that differing views have begun to appear in the circuits as to the application to front pay. Indeed, the circuits generally have not added to the debate since this Court declined to hear *Medlock*. A significant number of circuits have yet to directly address that issue. For

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[3] There also has been, during the short period of time since these cases began to develop, little learned attention directed to this matter other than student notes.

example, the First Circuit recognized the question but failed to reach the issue in *Carey v. Mt. Desert Island Hospital*, 156 F.3d 31, 40 (1st Cir. 1998).

However, within the circuits yet to address or make a holding on the issue presented, the district courts continue to steep and percolate the issue. Within the Second Circuit, for example, *see Fernandez v. North Shore Orthopedic Surgery & Sports Medicine, P.C.*, 79 F.Supp. 2d 197, 204 (E.D.N.Y. 2000) (finding that front pay not subject to the statutory cap after only a brief legal vs. equitable remedy analysis). The court in *Oliver v. Cole Gift Centers, Inc.*, 85 F.Supp. 2d 109, 116 (D.Conn. 2000), recognized the issue but did not reach it.

The Third Circuit has not reached the issue presented by Petitioner. Nevertheless, the district courts continue to refine the analysis of the question presented here. *See Bates v. Bd. of Ed. of Capital Sch. Dist.*, No. 97-394-SLR 2000 U.S. Dist. LEXIS 4873, at *25-26 (D.Del. Mar. 31, 2000) (concluding that the Third Circuit would find that front pay is an equitable remedy and subject to the statutory limitation); *Gentner v. Cheyney Univ. of Pa.*, No. 94-7443, 1999 U.S. Dist. LEXIS 15905, at *93-95 (E.D. Pa. Oct. 14, 1999) (to the same effect).

It is clear from these decisions that the lower courts continue to develop the analysis of the relatively narrow issue that Petitioner seeks to have reviewed by this Court.

III.

THE INSTANT CASE DOES NOT PRESENT A GOOD VEHICLE FOR PLENARY RESOLUTION OF THE ISSUE PRESENTED

The instant case, due to procedural and factual anomalies, does not present a good vehicle for consideration of the issue presented by Petitioner.

First, the district court failed to make a finding of fact regarding how much, if any, damages would have been assessed as front pay. The only mention of that category of damages appears in a cryptic footnote under the district court's conclusions of law, without a hint as to amount. *Pollard*, 16 F.Supp. 2d at 924 n.19. In fact, the district court's annotation could be read that front pay was included in the award of the maximum compensatory damages. The fact that the district court was of the opinion that the maximum statutory amount of compensatory damages did not cover all of Pollard's losses begs the question that limiting damages was the very intent of the 1991 amendment to the Civil Rights Act.

Second, in that the state law claim has yet to be tried, allocation of damages between federal and state claims has not been possible in this unusual situation where state claims have been remanded to the district court for trial. *See, e.g., Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212 F.3d 493, 509 (9th Cir. 2000); *Skidmore v. Precision Printing & Packaging, Inc.*, 188 F.3d 606, 618 (5th Cir. 1999).

Finally, other than noting the dispute regarding the ability of Petitioner to return to work prior to her termination (45a), the district court never made a finding that

reinstatement was impractical, a predicate to granting front pay. *United States v. Burke*, 504 U.S. 229, 239 n.9, 112 S.Ct. 1867, 1873 n.9 (1992); *Belk v. City of Eldon*, 228 F.3d 872, 883 (8th Cir. 2000). For these reasons, the district court has failed to provide a clear vehicle for this Court to determine the applicability of the statutory cap on damages to this case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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